Supreme Court of the United States

OCTOBER TERM, 1940.

In the Matter

of

The Petition of COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO for exemption from or limitation of its liability as owner of the steamship MANDU.

GREAT AMERICAN INSURANCE COMPANY, Petitioner.

BRIEF IN SUPPORT OF PETITION OF GREAT AMERICAN INSURANCE COMPANY FOR WRIT OF CERTIORARI.

POINT I.

THE COURT BELOW ERRED IN HOLDING THAT ARTICLE IV OF THE BRUSSELS CONVENTION GOVERNED THE RIGHTS AND LIABILITIES OF THE PARTIES IN MEASURING THE EXTENT OF DAMAGES RECOVERABLE FOR LOSS AND DAMAGE TO CARGO.

The MANDU was found at fault. Hence, were it not for the holding of the court below that Article IV of the Brussels Convention governed the rights of the parties, petitioner herein (cargo claimant) would have been entitled to recover its full damages from the owner of the MANDU under well settled American law. See *The New York,* 175 U. S. 187. However, the court below held that

Article IV of the Brussels Convention was applicable, that the faults of the DENDERAH were four times as serious in degree as those of the MANDU, and modified the opinion of the District Court to provide that only one-fifth of the cargo damages could be recovered from the owner of the MANDU. In so holding it is respectfully submitted that the court below erred.

A. Under well settled rules of this court it is impossible for a court of the United States properly to apply Article IV of the Brussels Convention. The court below, accordingly, should not have applied it.

Article IV of the Brussels Convention provides (R. 182):

> "If two or more vessels are in fault, the liability of each vessel is in proportion to the degree of the faults respectively committed; * * *
>
> The damages caused either to the vessels or to their cargoes * * * are borne by the vessels at fault in the above proportions, and even to third parties a vessel is not liable for more than such proportion of such damages."

Under these provisions it is mandatory that a Court shall first determine the proportion or percentage of fault which each of the two colliding vessels must bear with respect to the collision, *i. e.*, whether a vessel is liable for 10%, 30%, 60% or 90% or any other per cent. Unless such proportion can be determined properly by our courts the rule should not be applied.

In *The Atlas*, 93 U. S. 302, this Court held that such a rule, if adopted, would be "utterly impracticable" for the reason that a Court in Admiralty cannot apportion the loss according to the quantum of neglect or culpability on the one side or the other, saying:

"Strict justice would require, said Dr. Lushington, that the burden of making good the loss should fall upon the two delinquents in proportion to the delinquency, but in practice the proportion is impossible to be ascertained. Such a rule, if adopted, would be utterly impracticable, for the reason that the court cannot apportion the loss according to the quantum of neglect or culpability on the one side and the other; hence equal apportionment is the universal rule where there is mutual fault, even though the fault on one side may be much greater than the fault on the other. *The Milan Lush. Adm.*, 401; *The Lina*, 4 Jur. N. S. 147" (p. 314).

The binding effect of the above decision was recognized in the *Margaret-Manchester Merchant*, 30 F. (2d) 923 (C. C. A. 3), where the Court initially modified the decree of the District Court holding two colliding vessels equally at fault, and held that owing to greater fault on the part of one vessel, the damages should be divided three-quarters and one-quarter. Later, on its own motion, the Court modified its previous decision reinstating the decree of the District Court holding both vessels equally at fault (30 F. [2d] 928), saying:

"At the rehearing all doubts were dispelled by the thorough search made and assistance rendered by proctors for the several parties on a showing that, a few cases in lower courts to the contrary, the rule of the Supreme Court has been not to appraise different degrees of blame when injuries have resulted from mutual though unequal faults and apportion the loss accordingly, but to regard liability as mutual and to apportion the loss equally between the offending ships on the principle that damage by a common fault is a common loss. Beginning with the schooner *Catherine*, 58 U. S. 169, the first case

which raised the question before the court, and running through a long line of cases, *11 Corpus Juris*, 1200, *et seq.*, from which the following may be selected at random, *Atlas*, 93 U. S. 302; *North Star*, 106 U. S. 17; *Max Morris*, 137 U. S. 1; *Eugene F. Moran*, 212 U. S. 466; *White Oak Co.* v. *Boston Canal Co.*, 258 U. S. 341; this court, in its own research aided by the industry of proctors has found no case in which the Supreme Court has departed, even by variation in exceptional circumstances, from its rule of equal liability for mutual faults and equal division of damages, adopted expressly as the best rule for distributing justice between mutual wrongdoers. *The Max Morris, supra.* Yielding to these authoritative pronouncements, this court, wholly aside from whatever views it may have on the subject, is constrained to follow the rule and in consequence change its decision to that of affirmance of the decree dividing the damages equally in the manner which the law prescribes. *The North Star supra.*"

Petition for writ of certiorari was denied, 279 U. S. 862.

B. Serious and cogent reasons and wide differences between the practice and procedure in Admiralty Courts abroad and those in the United States make the Convention impossible of operation here.

Although the United States sent delegates to the Brussels Convention of 1910 and these delegates recommended that the Convention be adopted by this country, the United States has refused to adopt this Convention. Attempts to persuade the Senate to adopt it have been made as recently as January 10-14, 1938, hearings having been had before a sub-committee of the Committee on

Foreign Relations of the Senate for the 75th Congress on that date. No action, however, was taken by the Senate.

The question of adoption of the Convention has been discussed many times in the United States, not only by our Courts and legislative bodies, but also by members of the bar interested in admiralty and maritime law. Apportionment under the Brussels Convention has been disapproved, and one of the principal reasons for such disapproval has been put upon the difference in practice and procedure in collision cases abroad and the procedure here. Abroad the Courts have the assistance of nautical assessors, whose advice is always at the command of the English or Continental judges. In the United States no such assessors are provided, and accordingly if fault were to be apportioned our Courts would have imposed upon them the extraordinarily difficult task of weighing and determining the degree of fault in collision cases. The report of the Standing Committee on Admiralty and Maritime Law to the American Bar Association on the question reads:

> "There are various reasons why the American rule should not be changed. Our courts operate without the assistance of nautical assessors, whose advice is always at the command of English judges. Moreover, only a few of the American judges have any practical knowledge of navigation, and in the opinion of the committee, it would be imposing upon our courts an extraordinarily difficult task to require them to weigh the degree of fault in a collision case" (*Proceedings,* Vol. 54, 1929, at pages 281-4).

An excellent example of how English courts use assessors in cases of this nature is found in *H. M. S. "Glorious"*, 44 Ll. L. L. Rep. 321. In this case of collision, the Trial Court had held one vessel ⅓ to blame and the

other vessel ⅔ to blame. It will be noted from the decision of the Trial Court, 43 Ll. L. L. Rep., p. 450, that the trial Judge, Mr. Justice Bateson, sat with "Captain Owen Jones and Capt. C. E. Hannan, Elder Brethren in Trinity House."

An appeal was taken solely on the question of whether the decision of fault made by the District Court was proper. It will also be noted (44 Ll. L. Rep., p. 321) that the appeal was held before "Lord Justice Scrutton, Lord Justice Lawrence and Lord Justice Greer, sitting with Vice-Admiral W. Nunn and Captain W. E. Whittingham, Nautical Assessors."

The opinions of the Lord Justices clearly show the great reliance placed by the court on the expert nautical advisers with whom they sat. Thus Lord Justice Scrutton said:

> "We have asked our assessors this question: 'Assuming that the master of the Florida, in dense fog, heard a long blast from a vessel he could not see but which he estimated, to be 25 deg. to 30 deg. on his port bow, and very close, and then hard-a-ported, was such hard-a-porting a breach of good seamanship?' They answer: 'Yes, we consider Florida hard-a-porting to be a breach of good seamanship if she knew that the other ship was under way and she could not know whereabouts the other ship was and in what direction heading. The Florida was also to blame for not stopping.' So that we have four expert assessors all advising that the hard-a-porting of the Florida, under the circumstances, was a breach of good seamanship."

After discussing a further fault contended for by the appellant, Lord Justice Scrutton continued:

> "Again, I think that is largely a matter of seamanship, and we asked our assessors this question:

'The Glorious before dense fog, was steering 70 deg. and last saw the Florida seven miles off on her port quarter steering 75 deg. The Glorious then turned reciprocal but altered to 230 deg., and on hearing a distant whistle assumed the Florida to be more than 40 deg. on her port bow and kept her 230 deg. course. Apart from the blame for not stopping her engines on hearing the whistle, was the course of 230 deg. in dense fog a breach of good seamanship?' The assessors answer: 'No. We do not consider the course of 230 deg. a breach of good seamanship. The Glorious apparently took this course in order to run out of the fog, and it would eventually take her out of the track of shipping, so that, apart from the blame for not stopping her engines on hearing the whistle, we do not consider the course of 230 deg. a breach of good seamanship.' "

Similarly, Lord Justice Lawrence in his opinion, stated:

"The learned Judge has considered those reasons with the assistance of the Elder Brethren, and has come to the conclusion that the hard-a-port helm action taken by the Florida was bad seamanship. We have asked our assessors the question whether the hard-a-porting in the circumstances was good or bad seamanship, and we have received their answer that it was bad seamanship. Thus we have a finding by the learned Judge, by the Elder Brethren and by our assessors, that the hard-a-porting was bad seamanship. In those circumstances, the only course for this Court to adopt is to say that the finding of the Court below ought not to be disturbed."

It may well be proper for courts sitting with skilled nautical advisers to indulge in refinement as to the degree of fault applicable to two vessels in a case of collision.

The practice in this country does not afford such assistance to the judges either in the court of first instance or upon appeal. It is submitted that the rule laid down by this court in *The Atlas, supra,* and followed by all courts in this country ever since is the sound one and that the court below erred in departing therefrom.

The instant case is the first decision in this country apportioning damages under the Brussels Convention, and it is the first decision in modern times of any admiralty Court in this country apportioning damages otherwise than each vessel bearing 50% of the total damage, except the *Margaret-Manchester Merchant,* 30 F. (2d) 923 (C. C. A. 3), in which case the Court, upon rehearing, modified its previous decision and reinstated the decree of the District Court requiring each vessel to bear 50% of the total damages.

As the directions of this Court are mandatory to the effect that our Admiralty Courts may not attempt to apportion the degree of fault attributable to vessels at fault in collision, the prerequisite to a proper application of Article IV of the Brussels Convention could not be performed.

The Brussels Convention not being applicable in full, and the parties to this litigation being of different countries, this Court should administer the maritime law as accepted and applied by our law, *i. e.,* innocent cargo should recover in full (*The Scotland,* 105 U. S. 24).

We submit, therefore, as Article IV of the Brussels Convention cannot be applied by the courts of this country in its entirety or in accord with the intention of the signatories of that Convention it should not be applied at all.

POINT II.

IT IS CONTRARY TO THE PUBLIC POLICY OF THE UNITED STATES TO PERMIT ARTICLE IV OF THE BRUSSELS CONVENTION TO BE INTERPOSED AS A DEFENSE AGAINST A CLAIM BY INNOCENT CARGO.

A. It is the settled public policy of the United States that an innocent party who has suffered damage due to the negligence of joint tort feasors may recover *in solido* against any one of the joint tort feasors.

In *Wabash, St. Louis & Pacific Railway Co.* vs. *Shacklet*, 105 Ill. 364, the contrary English doctrine was considered, the authorities in this country analyzed and reviewed, and the Court held that it was contrary to public policy to deprive an innocent party, who had received an injury at the hands of two or more wrongdoers, of the right of recovery in full from each. This case was approved and followed by this Court in *Little* vs. *Hacket*, 116 U. S. 366.

In *The Alabama and The Game-Cock*, 92 U. S. 695, this Court held that the cargo owner was entitled to recover full damages and that

> "He (cargo owner) ought not to suffer loss by the desire of the Court to do justice between the wrongdoers" (p. 697).

In the recent case of *Galef* v. *United States*, 25 F. (2d) 134, this question of public policy was considered and the Court refused to allow the application of German law although the collision occurred in German waters. It was urged that the German Commercial Code applied and that under this code the rights of the cargo against the ship were limited to one-third of the loss sustained by

cargo. The Court, District Judge Hale, held that cargo could recover in full and said:

> "* * * I think the policy under which our courts take cognizance of actions in tort, based on foreign laws, is that, if the United States has jurisdiction of the necessary parties and can do substantial justice between them, in accordance with its own method of procedure, the courts will enforce the foreign law, if it is 'not contrary to the public policy of the forum, to abstract justice or pure morals, or such as may injure the state or its citizens.' Cases bearing upon this subject are grouped in *12 Corpus Juris*, 452.
>
> *The government has refused, I believe, to ratify the rule laid down by the Brussels Convention as to proportional liability in collision cases.* Our courts have recognized the difficulty of determining the degree of fault to be attached to each ship, and *the injustice of requiring the innocent cargo owner to proceed against two joint feasors, one of whom may be beyond his reach;* and our courts have allowed the cargo owner to collect all his damages from either wrongdoer, leaving to that wrongdoer the right to pursue his remedy against the other for a contribution. In *Phoenix Ins. Co.* v. *The Atlas*, 93 U. S. 302, 317 (23 L. Ed. 863), the court discussed the English rule announced in *The Milan*, Lushington, Adm. 401. In speaking for the Supreme Court, Mr. Justice Clifford said:
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> 'Even suppose that the case of *The Milan* is a correct exposition of the Admiralty Law, as administered in the jurisdiction where the decision was made, still it cannot control the question before the court, for the reason that the rule *of practice* here is different, as is clearly shown by the judgment of this Court delivered at the last term

of the Court, *The Alabama* and *The Game Cock*, 91 U. S. 695 (23 L. Ed. 763).'

It appears that, to hold the German statute applicable here, as contended for by the respondent, this court would be obliged to say that a negligent shipowner could relieve himself by stipulation from making compensation for his wrongdoing, and thus deprive the cargo owner of all remedy for the greater part of his loss. I think this would be to endorse a law injurious to the citizens of the United States and 'contrary to the public policy of the forum, to abstract justice and pure morals.' For the Harter Act relieves a shipowner from liability for negligence of the officers and crew under certain carefully restricted conditions and prohibits the owner to stipulate against his own negligence. The question whether or not an act gives rise to liability to tort, I think, depends on the *lex loci delicti,* the *lex fori* controlling in matters of procedure and remedy. *Pritchard* v. *Norton,* 106 U. S. 124, 129, *et seq.,* 1 S. Ct. 102, 27 L. Ed. 104; *Bank* v. *Donally,* 8 Pet. 361, 8 L. Ed. 974; *Ruhe* v. *Buck,* 120 Mo. 178, 27 S. W. 412, 25 L. R. A. 178, 46 Am. St. Rep. 439; *Burchard* v. *Dunbar,* 82 III, 450, 25 Am. Rep. 334; *Hoadley* v. *Transportation Co.,* 115 Mass. 304, 16 Am. Rep. 106; *12 Corpus Juris,* 447. Our courts have held that the law controlling all matters pertaining to the remedy is the *lex fori.*

It will be found that both American and German law recognize negligent collision as a tort giving the injured party a right to damages; they differ only as to the amount of damages recoverable from each wrongdoer, and in such a situation I think, the law of the forum applies. *The method of apportioning* damages against *tort feasors* in collision is a matter of *practice. Phoenix Ins. Co.* v. *The Atlas,* 93 U. S. 302, 23 L. Ed. 863, *supra.*" (Italics ours.)

The foregoing is applicable here and our courts should refuse to permit "the injustice of requiring the innocent cargo owner to proceed against two joint feasors, one of whom may be beyond his reach." As stated by the Court, this is, we submit, "contrary to the public policy of the forum, to abstract justice or pure morals."

See also *The Atlas*, 93 U. S. 302, *supra; The New York*, 175 U. S. 187, 209.

The Eagle Point, 142 Fed. 453 (C. C. A. 3, cert. den. 210 U. S. 644), and *Royal Mail Steam Packet Co.* vs. *Companhia de Navegacao Lloyd Brasileiro*, 31 F. (2d) 757, are to the contrary. However, in neither of these cases did the party claiming the benefit of foreign law seek the Courts of the United States and the advantages of the United States law, as the owners of the MANDU here are seeking the boon of our limitation statutes. Furthermore, in neither case was the question of public policy as to the enforcement of foreign law, contrary to our well established practice, considered.

In passing, it should be noted that Hough, J., in *The Titanic*, 204 Fed. 298, and the Circuit Court of Appeals for the Second Circuit in *Yang-Tsze Ins. Ass'n, et al.* v. *Furness, Withy & Co., Ltd.*, 215 Fed. 859 at pp. 865-867, questioned the correctness of the decision in *The Eagle Point, supra.*

B. It is contrary to the public policy of the United States to allow a foreign subject to seek the refuge of our courts and the benefit of our protective statutes and at the same time have the benefit in other respects of foreign law.

The owner of the MANDU is a Brazilian corporation and has filed a petition for limitation of its liability in the United States District Court, Eastern District of New York, and prayed that it be allowed the benefit of our limitation of liability statutes. The record is silent as to

what, if any, limitation of liability statutes are in force in Brazil.

This Court in an analogous situation has held that when the owner of a foreign vessel comes into the courts of the United States and invokes the benefits of our limitation of liability statutes, foreign law may not be applied as to other phases of the case, but that the entire controversy should be determined according to the law of the United States.

La Bourgogne, 210 U. S. 95.

In this case a French vessel was sunk in collision and various claims were filed for personal injuries, loss of life and cargo damage. Of course, it is true that a French vessel is considered to be French territory and that ordinarily the law of France would be applied with regard to a tort occurring on French territory. It was accordingly urged that, "as all the claims arose exclusively because of damage done to persons or property on board the steamship, the fault of that vessel should be decided by the theory which would be applied in the courts of France." It was then urged that under French law the vessel was not at fault and should be completely exonerated from all liability. This Court said:

> "* * * Be that as it may, however, we are of the opinion that we must decide the case before us by the international rule as interpreted in the courts of the United States, and not by the practice under that rule prevailing in the French courts, if there be a difference between the two countries. The petitioner here is seeking the benefits conferred by statute of the United States, which it could not enjoy under the general maritime law. Strictly speaking, the application for a limitation of liability is in effect a concession that liability exists, but, because of the ab-

sence of privity or knowledge, the benefits of the statute should be awarded. It is true that under the rules promulgated by this court the petitioner is accorded the privilege not only of seeking the benefits of the statute, but also of contesting its liability in any sum whatever. This does not, however, change the essential nature of the proceeding. As the petitioner called the various claimants into a court of admiralty of the United States to test whether, in virtue of the laws of the United States, it should be relieved in part at least of liability from the consequences of the acts of its agents, and as the international rules have the force of a statute, we think the issues presented were of such a character as to render it essential that the right to exemption should be tested by the law as administered in the courts of the United States and not otherwise" (p. 116).

So in the instant case, the owner of the MANDU by a petition for limitation of liability called the various claimants into a court of admiralty of the United States to test whether, by virtue of the laws of the United States, it should be relieved, in full or in part, of liability from the consequences of the acts of its agents, and it is, therefore "essential" that the measure of its liability to innocent cargo "should be tested by the law as administered in the courts of the United States and not otherwise".

Likewise the decision of the court below is contrary to the holding of this Court in *The Titanic*, 233 U. S. 718. There, only a single vessel of British nationality was concerned. It was urged in the District Court that inasmuch as the law of England differed from that of the United States with respect to the amount of the vessel owner's liability that the law of England should govern as to the amount of such owner's liability.

It was also urged that causes of action for death at sea due to collision or other causes are governed by the law

of the flag and that upon fundamental principles the British law as the *lex loci delicti* fixed the extent of the vessel owner's liability.

The Circuit Court of Appeals certified to this Court the following question:

"C. Will the courts of the United States in such decisions enforce the law of the United States or of the foreign country in respect to the amount of such owner's liability."

This court answered the foregoing question by holding that the law of the United States should be applied as to the amount of liability. The court specifically approved *La Bourgogne, supra,* and with respect to the limitation of liability statute, said:

> "This statute well might be held to announce a general policy, governing both obligations that arise within the jurisdiction and suits that are brought in the courts of the United States. *Emery* v. *Burbank,* 163 Mass. 326, 328" (p. 733).

The damages claimed here amount to $365,000 (R. 101). The value of respondent's vessel (MANDU) has been adjudged to be $260,000, and respondent sought to receive and has received immunity from any liability in excess of this sum plus certain interest (R. 2173). We submit that inasmuch as the owner of the MANDU has sought the benefit of our law for limitation of liability purposes and to cut down its damages substantially by reason of our limitation statutes, its request that in another respect our Federal Courts should apply a foreign law (a law which the United States has refused to adopt for thirty years) should be denied. Innocent cargo, we submit, should be paid in full under our law up to the limitation value of the wrongdoing vessel.

POINT III.

IF IT SHOULD BE HELD THAT ARTICLE IV OF THE BRUSSELS CONVENTION PROPERLY MAY BE APPLIED BY COURTS OF THE UNITED STATES TO DEPRIVE AN INNOCENT CARGO OWNER OF FULL DAMAGES FROM A WRONGDOER, THE COURT BELOW, NEVERTHELESS, SHOULD HAVE APPORTIONED DAMAGES ACCORDING TO THE MOIETY RULE.

We have shown above under Point I that this Court held that it is "utterly impracticable" for our courts to apportion fault between two colliding vessels other than equally. We have also pointed out that this Rule is so well settled that the Circuit Court of Appeals for the Third Circuit in the *Margaret-Manchester Merchant*, 30 F. (2d) 923, on its own motion, modified its previous decision wherein it did apportion damages other than equally to change the holding to accord with the moiety rule.

Article IV of the Brussels Convention does not provide only for apportionment of liability according to the degree of fault. It also provides (R., p. 182) that

> "If, having regard to the circumstances, it is not possible to establish the degree of the respective fault, or if it appears that the faults are equal, the liability is apportioned equally."

It being the settled law of this country that it is "utterly impracticable" (*i. e.*, not possible from a practical viewpoint) "to establish the degree of the respective faults," the court below erred in apportioning fault 80% and 20% as it did. Thus, even if the Brussels Convention be applied, the fault should have been apportioned equally and the 50% recovery allowed to cargo by the District Court should not have been disturbed by the Circuit Court of Appeals for the Second Circuit.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Court should grant the writ of certiorari sought herein and review the decision of the Circuit Court of Appeals for the Second Circuit to determine:

1. Whether Article IV of the Brussels Convention properly can be applied by a court of the United States in an action brought by a foreign vessel owner seeking the benefits of our limitation of liability statutes; and

2. Whether, even if Article IV of the Brussels Convention may be applied by a Court of the United States, apportionment of fault between colliding vessels other than equally properly may be made.

Respectfully submitted,

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New York, November 15, 1940.